

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Grievant

Record of Proceedings
FSGB No. 2009-006

And

June 9, 2010

Department

**DECISION
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Susan R. Winfield

Board Members:

Garber A. Davidson
Jeanne L. Schulz

Special Assistant

Joseph Pastic

Representative for the Grievant:

Pro se

Representative for the Department:

Lisa K. Schneiderman
Agency Representative
Office of the General Counsel

Employee Exclusive Representative:

American Foreign Service Association

CASE SUMMARY

HELD: Grievant, an untenured U.S. Foreign & Commercial Service Officer of the Department of Commerce, failed to demonstrate by preponderant evidence that statements in three of her performance assessments were falsely prejudicial, inaccurate or unfair, that the agency had retaliated against her for filing a grievance, or that one of her performance assessments was biased and unbalanced. The grievance appeal was denied in its entirety.

OVERVIEW

After grievant was denied tenure, she filed an agency grievance in which she made several claims concerning her performance appraisals, alleged retaliation by the Department, and bias on the part of a rating official. The Department denied grievant's agency-level grievance and in her appeal to the Board, grievant alleged that she was denied tenure for three reasons: (1) three of her performance assessments (PAs) contained material omissions and/or tepid, unfair, inaccurate, unwarranted or falsely prejudicial statements; (2) the rating officer for one of her PAs was unfairly biased; and (3) the Department retaliated against her for filing this grievance. The alleged retaliation was based on the Department's cancellation of grievant's travel orders; its refusal to assign her to Washington D.C. from Minneapolis after she sustained an injury; and its demand that she file a statement of accomplishment after her involuntary separation from the Service.

The Board found that with respect to challenged statements in the PAs, the evidence clearly demonstrated that grievant's assertions were principally explanatory or exculpatory and did not convincingly dispute the accuracy of the contested statements. The evidence showed that the statements were factually accurate and not falsely prejudicial. Nor was there evidence of material omissions in the evaluations that would have prejudiced grievant before a tenure board.

Grievant's assertion that the rating officer for one of her PAs was biased was based on rumors that were not corroborated by the evidence. However, even if the rumors were true, the Board found no resulting bias on the part of the rater in his description of grievant's performance or potential. To the contrary, the rater cited several contributions by grievant that he considered exemplary. The grievant's claims of retaliation failed because once grievant filed her grievance, the Department was obliged to maintain the status quo, including the grievant's current assignment of duty station. Finally, the agency's demand for grievant to file a statement of accomplishment after her separation was rendered moot because the agency suspended that requirement pending the outcome of the grievance process.

DECISION

I. THE GRIEVANCE

On March 6, {year}, grievant, an untenured U.S. Foreign & Commercial Service Officer of the Department, filed an appeal to this Board alleging that she was denied tenure because of falsely prejudicial statements and omissions in three performance appraisals (PAs). Grievant further claims that the Department retaliated against her for filing her agency grievance. Grievant requests that the disputed PAs be corrected or expunged; that her Foreign Service appointment be extended for a period of compensatory performance appraisal; and that her corrected record then be submitted for tenure review.

II. BACKGROUND

Grievant filed an agency-level grievance on October 27,{year} in which she alleged that her PAs for rating periods 2005-06, 2006-07 and 2007-08 contained “material omissions and/or tepid, unfair, inaccurate, unwarranted or falsely prejudicial statements.” Grievant filed a supplemental submission on December 1, {year}. The agency denied the grievance in its entirety on February 20, {year}. On March 5, {year}, grievant filed an appeal to this Board. In her appeal submission, grievant requested interim relief to stay her separation until her grievance is decided. She also requested that the Board direct her immediate assignment to Washington, D.C. On March 17, {year}, the Board acknowledged receipt of the grievance; granted grievant a temporary stay of separation until her request for interim relief could be decided; and denied her request for immediate reassignment to Washington pending the Board’s decision on interim relief.

The PA statements that grievant disputes relate primarily to criticisms of her time management skills and her failures to meet deadlines. She also alleges that her PAs contained

other prejudicial statements pertaining to challenges she had dealing with senior staff, her lack of technological proficiency and her failure to express herself adequately regarding modified job responsibilities. In denying grievant tenure, the tenure board cited her difficulties with resource and time management as the principal bases for its decision. Grievant further alleges that the agency engaged in certain conduct that was in retaliation for her filing a grievance.

On March 26, {year}, grievant reiterated her request for interim relief, a directed assignment to Washington and a stay of separation. In its Order of April 10, {year}, the Board denied the motion for interim relief and the directed assignment, but granted a 15-day stay of separation. The Board further concluded, based on grievant's clarification, that the grievance would be treated as a claim under 22 USC §§ 4131(a)(1)(A) and (F) and not as an action under 22 USC § 4131(a)(1)(H), proscribing discrimination under the Rehabilitation Act.¹

Grievant was separated from the Department on April 25, {year}. She then filed a request for discovery that prompted the Department to file a motion to strike the discovery request and to close the Record of Proceedings (ROP). The Board, on May 29, denied the agency's motion. Grievant filed a motion to compel discovery on July 9, which the Board denied in its entirety on November 10. Thereafter, grievant filed a Supplemental Submission, to which the agency responded on January 21, {year}. On February 22, grievant filed a Rebuttal statement and on May 17, {year} the ROP was closed.

III. POSITIONS OF THE PARTIES

In order to avoid unnecessary redundancy, we treat the positions of the grievant and the Department jointly in this section. Grievant makes three general allegations: (1) three of her

¹ In its acknowledgement letter, the Board asked grievant to address the question whether grievant intended to raise an issue under the Rehabilitation Act as provided by 22 U.S.C. §4131(a)(1)(H). In her response dated March 26, {year}, grievant stated, "I have not raised any claims under 22 U.S.C. §4131(a)(1)(H). However, I maintain that statements in my {year} performance appraisal are falsely prejudicial in light of my disability."

PAs contain material omissions and/or “tepid, unfair, inaccurate, unwarranted or falsely prejudicial statements;” (2) the rating officer for the 2007-2008 PA was unfairly biased; and (3) the Department retaliated against her for filing her grievance by canceling her travel orders, refusing to assign her to Washington D.C. and demanding that she prepare a statement of accomplishment after her involuntary separation from the agency.

A. *The Performance Appraisals*

The 2005-06 PA

Grievant challenges the following statements printed in bold:

Grievant faces difficult challenges in view of the seniority of the staff she manages both directly and as Acting Senior Commercial Officer.

Grievant: Grievant argues that this statement is a criticism of her management skills. She acknowledges the seniority of the Foreign Service National (FSN) staff in {post}, but contends that she managed it well during a period of intense activity. She explains that the Commercial Service (CS) office handled two major tenders during this period of review, and grievant states that the office under her direction “worked non-stop” to ensure the success of a sale involving Lockheed-Martin. Grievant characterizes herself as an integral member of the Ambassador’s team during this period. She alleges that her added responsibilities as Acting Senior Commercial Officer (SCO) were not included in a Memorandum of Performance or in her evaluation which constituted a material omission that prejudiced her tenure opportunity. She argues that her successful management of additional responsibilities as Acting SCO refutes the statement by her rating officer that she was challenged in managing senior staff.

In addition, grievant argues, there was tension among the staff over a possible reduction in force and the handling of that situation by the Embassy’s Human Resources (HR) office. This caused good will and trust between staff members and management to disappear. Hostility

among the FSN staff was manifested in both real and imaginary illnesses. Grievant sums up the situation by distinguishing her management style from that of the incoming SCO, who was her rating officer, as follows:

CS- {post} was no longer healthy or productive. My top priorities became detoxifying the workplace environment and the fostering of a functioning workplace. I was determined to do whatever it took, within reason, to ‘make things better’—talking with the staff, spending extra time explaining reasons and motives to them, etc. The SCO’s management style and mine differed, especially in this type of crisis situation.

Grievant maintains that her relations with the FSN staff were “excellent.” She cites an earlier PA in which the rating officer commended her for her supervisory abilities and for forging a “strong professional team.”

Department: The agency argues that the language at issue is straightforward and merely recognizes that the staff in {post} was quite senior. The agency contends that the seniority of the FSN staff presented managerial challenges to grievant as she acknowledged. The agency argues there is no implication in the challenged statement that grievant was unable to perform her duties as a manager or as Acting SCO. In addition, the agency asserts, there was no material omission in the PA of work performed by grievant given that she provided her own statement of accomplishments for the period during which she was Acting SCO. Such performance was included in the materials provided to the tenure boards. In sum, the agency claims, grievant cannot show that the statement unfairly, impliedly, expressly or inaccurately criticized her performance; nor does she show a material omission in the PA.

The large increase in CS products generated by our office demands effective time management, the ability to prioritize, and timeliness, all areas in which grievant continues to demonstrate rapid improvement. Grievant is finding her way in terms of the right balance between well written material produced by non-native English speakers and the need to get the product out the door.

Grievant: Grievant cites the preparation and publication of the “Country Commercial Guide: Doing Business in Greece” (CCG) as evidence of her skills in time management, prioritizing and interacting with people. She describes the CCG as a project that exceeded any other duty or responsibility at CS-{post}. According to grievant, annual publication of the CCG took teamwork, coordination and planning. She states that she submitted the CCG to FCS Headquarters on or before the due dates in {year}, {year} and {year}. She cites her {year} PA in which her rating officer commended her for delivering an “excellent product” even though the deadline that year for publishing the CCG coincided with her departure date from post.

Grievant also cites her responsibility for supervising International Company Promotion (ICP) products. She asserts that “there was no problem with time management, prioritizing or timeliness” in the sale of these products. However, grievant acknowledges that she was initially very tardy in approving Export Successes (ES) reports. She claimed that she was unaware that they were to be approved immediately upon submission. Instead, she was reviewing them quarterly. She further acknowledges that these delays caused “staff dissatisfaction.”

Grievant states that her standards for completing reports and other products for consumption by U.S. businesses differed from those of her rating officer. She claimed that her local staff needed to understand the expectations of U.S. business and therefore she spent considerable time with the staff editing and revising their work product. Because many staff members were non-English speakers (and writers), their work required more time to assure a

quality product. Grievant points out, however, that the rater commended her for being an excellent writer.

Department: The agency argues that grievant does not dispute the fact that her office required effective time management, the capacity to prioritize, and timeliness, or that she demonstrated improvement in these areas. The agency notes further that grievant acknowledges that her assignments (particularly the CCG) demanded more effective time management skills and the ability to prioritize better. The agency argues that although grievant explains why the written work was sometimes untimely, she does not challenge the statement that she was not always able to balance having written work well-drafted by non-native English speakers with the office's need to release the product rapidly.

The Department cites the highly laudatory comments in the PA regarding grievant's writing and editing skills and her attention to detail. These comments are positioned between the above two disputed statements which, the Department argues, shows that the PA is balanced. The agency challenges grievant's submission of supporting statements from her colleagues to bolster her allegations that the PA is inaccurate. The Department states that none of the supporting statements were from individuals who had supervisory responsibility over grievant or were contemporaneous with the challenged PA. The Department further states that none of the supporting statements addresses any of the cited performance challenges. The agency lastly argues that positive comments by grievant's former rating officer made during her first tour (2004-2005) were included in the materials made available to the two tenure boards that decided not to recommend tenure.

The 2006-07 PA

[Grievant] failed to submit a statement by March 15, {year}, the required 21 days after departure from Post and six days prior to the deadline for submitting the completed signed Performance Plan and Appraisal to Washington, DC.

Grievant: Grievant claims that this statement is “inaccurate.” She disputes the due date for her final performance appraisal, stating that the regulations provide that it was not due until 45 days after she left post. She departed {post} on February 22 and, by her calculations, her appraisal was not due until April 8. She admits, however, that she submitted her Statement of Accomplishments on June 25, {year} and, therefore, that this submission was late. Grievant cites “extenuating circumstances” for her tardiness, including her mother’s unexpected death in September {year}. In the fall of {year}, grievant worked a reduced schedule and applied for early release from CS-{post} due to personal hardship. She spent her last days at post finishing the CCG. As a consequence, she contends she was unable to work on her 2006-07 Accomplishment Statement before she left post. She returned to {city name} where she was on a combination of Family Friendly, Bereavement and Home Leave from February 23 through May 5, {year}. During this period, grievant asserts that she handled burial and estate matters for her mother. Given the extenuating circumstances, grievant avers that the rater’s statement “is highly prejudicial.”

Department: The agency notes that grievant does not deny that she failed to submit the accomplishment statement by the established deadline. She claims that extenuating circumstances, i.e. the death of her mother and her decision to prepare her mother’s home for sale among other activities, caused the delay. Before she left post, however, grievant was given specific instructions that her statement of accomplishments was due to her reviewing officer on March 13, that is, 21 days after her departure. In addition, her rating officer stated in an e-mail

to grievant that if the accomplishment statement were not received by the due date, he would proceed with drafting the PA and would represent that no accomplishment statement had been received. Grievant acknowledged receipt of the e-mail. At no time did she request an extension. The agency argues, therefore, that grievant had fair notice and advance warning of the consequences if she failed to submit her statement on time. The Department also argues that grievant had sufficient time to meet the established deadline, notwithstanding her personal situation. In the Department's view, the cited statement is "true, warranted and fairly represents that Grievant did not appropriately prioritize or plan for the timely preparation of her accomplishment statement."

In certain areas, grievant faces challenges, particularly in meeting deadlines. Personnel related documents are one example. Although grievant ensured that the work plans and appraisals for the two employees she supervised were completed, not all were timely.

Grievant: Grievant insists that her failure to meet deadlines was "isolated and related to the volatile personnel situation at CS-{post}." She states that under those circumstances, the challenged comment is "completely unfair" and is an example of how she became "collateral damage to the CS-{post} personnel situation." According to grievant, there was considerable dissension and disagreement among the local staff with respect to work plans and appraisals. Grievant emphasizes her role in making necessary adjustments to, and counseling of, the staff. Part of the exercise involved changing and lowering ratings and, as grievant states: "I wanted to be as transparent as possible and communicate fully the reasons for any downgrading. I did not want to leave any room for misunderstanding." Because she knew this process was time consuming, grievant states that she spoke to the SCO and informed the Embassy HR office that her work plans and appraisals would be late. She was told by HR that this would be "no problem," and she communicated this to the SCO.

Department: The agency argues that despite grievant's explanations, the challenged statement is accurate. Grievant does not dispute that the referenced work plans and appraisals for the two employees were late. Her rationale is that other work consisting of projects and documents were submitted before deadlines. This statement actually supports the comment that she faced challenges in certain areas, one example being with personnel related documents.

Her statement of accomplishments for her {year} appraisal was, similarly, submitted after the July 15 deadline for submission of the Performance Plan and Appraisals to Washington.

Grievant: Grievant describes the statement as "patently false." She states that she was unable to submit the evaluation material on July 15 since the reviewing officer was on leave and unable to sign her PA. She argues that the statement, therefore, is unfair. Grievant claims that she reported the unavailability of her reviewing officer to HR and reportedly was told by an HR employee that so long as the appraisal was submitted on or before July 30, {year}, that would be fine and the appraisal would not be considered delinquent. Grievant claims that her rating officer was then on Home Leave. She states that she e-mailed and faxed her 2005-06 appraisal documents to HR on July 29, which she says was timely. In support of her position, grievant cites the "Supplemental Information" included in Section I of her Supplemental Submission in which "Actual" and "Customary" practice is described. In {year}, the Supplemental Information indicates that while her completed appraisal was due on July 15, there was a two-week grace period.

Department: The agency argues that grievant submitted her statement of accomplishments on July 20, {year}, after the established July 15 deadline. The agency asserts that grievant is in error when she claims that the July 15 deadline was not the "drop dead" deadline and that she in fact met the real deadline of July 30. According to the Department,

these dates were the deadlines for rating officials to submit completed PAs to the Department, not deadlines for submission of the employees' statements of accomplishments. Similarly, the agency asserts that grievant's claim that she was excused by a representative of the Department (name) is untenable. She provides no evidence other than her assertions that {name} excused her or otherwise extended the applicable deadline. The agency notes that the grievant's e-mail to {name} is irrelevant since it is dated two months after grievant's late submission and does not pertain to her circumstances. Finally, her claim that she was singled out discriminatorily for submitting late performance appraisals is without merit. In answering this allegation, the Department states in pertinent part:

Grievant provides absolutely no credible, relevant evidence of being treated unfairly, unjustly or differently than any other officer. Notably, she has not identified even one officer who submitted untimely performance materials, but whose untimeliness was not noted in his/her appraisal. Instead, Grievant relies on her own mere speculation when asserting that untimeliness such as hers was common in the US&FCS and that other officer's [sic] untimeliness was *not* noted in their performance appraisals.

Communication with management for clarity in terms of responsibilities and expectations is another area for grievant to build on. In those instances where the workload becomes unsustainable, I would encourage grievant to take the initiative to work with management to recalibrate roles, duties and responsibilities.²

Grievant: Grievant argues that in the 2006-2007 PA, the rater stated, "[grievant] made sure that her obligations toward *these responsibilities* were met." (Emphasis added.) Grievant claims that this statement by her rater contradicts the challenged statement that she needed to improve her communications with management about her responsibilities. She further argues that she was reluctant to admit to management that she was unable to complete a task because she had a disability that caused her to be slow in typing and performing other tasks.

² Although grievant did not include this statement in her agency-level grievance and therefore technically did not exhaust agency procedures, the Department waives its objection to Board consideration. The Board accepts the Department's waiver and includes the statement in its consideration of the appeal.

Department: The agency argues that, again, grievant explains, but does not challenge the accuracy of the statement at issue. The Department notes that the statement by the rater that grievant has “met her responsibilities” has been taken out of context. The complete statement, in context, is: “Working together we reduced the scope of grievant’s responsibilities. She made sure that her obligations towards these [reduced] responsibilities were met.” Thus, there is no inconsistency in the criticism of grievant’s ability to handle her responsibilities, and no inconsistency with the rater’s prior comment on responsibilities that was distinct and unrelated to the disputed statement.

The agency argues that neither grievant’s disability nor claimed “slowness” is suggested or stated in the challenged statement and “any assertion to the contrary is misleading and misconstrues the challenged comments.”

The 2007-2008 PA

She initially shared a past experience of technology not being a strength and was immediately given the responsibility of backing up the office servers. The whole office has supported her and her efforts to become more comfortable with technology. . . . It is essential that she continue to develop her technology skills and understanding to improve her efficiency and productivity.

Grievant: Grievant asserts that her supervisor frequently stated that the CS office in {city} was on the “cutting edge” technologically. She states that she will never be that advanced in technology. She argues that her rater knew that she was disabled and had fine motor coordination problems. This necessitated the use of voice-operated software. Given the rater’s knowledge of her circumstances, grievant claims that the challenged statement is misleading and condescending. She states that she had earlier confirmed and described her disability to the rater and had supplied him with an updated report from her neurologist. Further, grievant had been certified as handicapped by the {state name} Department of Rehabilitation. Grievant insists that

the statement relates negatively to her disability and is, therefore “grossly unfair.” Lastly, she argues that the level of technological skills required by a foreign commercial officer, as compared to a trade specialist, is minimal.

Department: The agency observes that grievant does not dispute any facts expressed in the statement. Contrary to her allegations, the agency argues that the rater never held her to a standard requiring her to be “on the cutting edges technologically,” nor did he criticize her for failing to meet that standard. According to the Department, the disputed statement reflects an accurate and balanced assessment of grievant’s performance. The rater recognized grievant’s progress in developing her technology skills and noted that “continued” development was important. The Department asserts that these comments have nothing to do with grievant’s disability, but pertain only to her skill and comfort with certain technology. They do not in any way refer to her neurological condition, fine motor coordination, speech or gait. The agency urges that the comments are “lawful, fair, neutral and . . . accurate.”

From her mid-year, grievant has improved in ensuring that she is clear on when she will meet deadlines and communicating with me if she is unable to meet a deadline because of some unforeseen circumstance. This is the [sic] essential in serving our clients and in collaborating with colleagues in the office.

Grievant: Grievant asserts that the implication of the statement is that she was unable to meet deadlines and, therefore, was unable to serve her clients or collaborate with colleagues. She admits, however, that she is often “overly optimistic” about how soon she can complete a task, especially those involving computers. She acknowledges that some deadlines that she sets are unrealistic, but she fears that if she gives a more realistic time estimate, she will be regarded as a disabled person who cannot get the task accomplished. To dispel any notion that she had problems serving clients or working with colleagues, grievant attached to her grievance letters of support from her colleagues at CS-{city name}.

Department: The agency notes that grievant does not dispute the factual content of the statement. Rather, she acknowledges that she should attempt to establish and meet more realistic deadlines. The agency argues that the comment regarding clients and colleagues, however, is “facially neutral.” When read in context, the comments merely identify basic elements of client service, i.e. meeting deadlines or notifying in advance when deadlines will not be met.

An area in need of improvement is her operational effectiveness. An example is her accomplishment statement, originally it was to be completed by June 10th, and it was finally placed on my desk July 3rd.

Grievant: Grievant acknowledges that she and her rating officer had set a number of internal deadlines, with most being rescheduled due to grievant’s delays in writing her statement of accomplishments. She states that she sent a set of bullet points to her rater on June 2. Despite rescheduling her submission date a number of times, grievant admits that the statement was not finally submitted until July 2. She notes that the completed PA was timely submitted to the Department by July 30. Although she acknowledges missing an internal deadline, grievant maintains that the statement in her PA is unfair and unwarranted because, in her words, “the deadline was merely an agreed upon date subject to change.”

Department: The agency notes that grievant acknowledges that internal deadlines were set and reset because she had problems writing her statement of accomplishments. The Department claims that grievant treated deadlines “cavalierly” as evidenced by her actions and her assertion that an internal deadline is merely an agreed upon date, subject to change. The agency observes that grievant not only rescheduled one internal deadline, but she reset four additional internal deadlines and departed for vacation without submitting even a draft of the required statement. The draft was submitted seventeen days after the final last internal deadline had passed. She then requested even more time (which was granted) to hand in her final

accomplishment statement. The agency notes that the final internal deadline took into account the rater's need to travel shortly thereafter. The Department states that grievant was aware of her rater's responsibilities and time constraints, so when she missed the final agreed deadline, she did so without regard to the impact her actions might have had on her rater's operational effectiveness. The agency asserts that grievant's rater had to work on a Saturday while he was on annual leave in order to complete the PA and send it to the Department one day before the tenure board met.

As our office has moved to the balanced scorecard, the importance of entering information to CTS and e-menu is extremely important to measure activities and for the transparent delivery of service. The activities, both counseling sessions and export successes, entered in CTS by CO grievant do not accurately reflect her contribution to this office and the CS organization.

Grievant: Grievant acknowledges that this statement is true, but avers that the software and system referenced in the statement was not accessible to her because of the voice-activated software she was using due to her disability. She claims that she tried, but was unable to make entries by hand because this was too slow. Although she received training in how to use the new application, she maintains that the system is "not compliant with Section 508 of the Rehabilitation Act of 1973."

Department: Grievant does not dispute the factual content of the statement. She claims that the statement is illogical and unfair because the software she was required to work with was incompatible with the voice activated operating system that the Department had previously provided to her. The agency claims that grievant misconstrues the comment. The statement is an observation that grievant did not accurately capture in the database all of her activities and contributions to the office; it is not a criticism of her skill in using the technology. The agency also observes that grievant did not disclose any problem she had using the software during the

rating period and never mentioned problems she may have had in putting her activities and contributions accurately. Had she mentioned difficulties or frustration, the Department claims that it would have provided an accommodation to ensure that her activities and contributions were more accurately captured. The statements are fair, logical and appropriate.

B. Underlying Bias and Unbalanced Appraisal

Grievant: Grievant claims that shortly after her arrival at CS-{city}, her rater informed her that he had been told that the U.S. Ambassador to {country} had requested that the FCS recall her from post for cause. The intimation was that she had not performed her duties and responsibilities and that her tour had accordingly been curtailed. Grievant states that such assertions and rumors are factually untrue. She requested early release from the post because of her mother's unexpected death. Grievant also claims that her rater also told her that he had received negative calls from her former supervisor and subsequent to these calls, the rater had questioned "what kind of officer he had gotten." Grievant states that in her view, although her rater tried to keep an open mind, he was likely influenced by these rumors. She complains that this "defamation is very serious, especially in small agencies. . . . Reputations can make or break a career. . . . Such a damning statement is not easily . . . ignored."

Grievant further complains that the 2007-08 PA was not balanced and was merely a "laundry list" of her activities. She states that, except for two items, it did not mention the contributions she made to the office. The rating officer made no recommendation for tenure and, according to grievant, advised her that he had been told he was not permitted to do so. She states that sample evaluations she has received in fact included recommendations. She states that the PA failed to provide a balanced summary of her performance or of her potential as a commercial officer.

Department: The agency argues that grievant has produced no affirmative evidence that her rater was biased, other than her stated presumptions. The agency claims that the 2007-2008 PA is “facially unbiased.” Although her rater did speak with the former rating official, the rater stated that he assured grievant that the past would not influence his judgment; that she had a “clean slate” in the {city name} Office; that the office worked as a team; and that it was important to focus on the present. The Department states, moreover, grievant’s rater employed “diligence and care” to provide her with a reasonable and balanced rating. According to the agency, the rater presented information in his appraisal that grievant had requested him to address because she lacked space in her accomplishment statement to do so. In response to her rater’s statements, grievant thanked him for his support and guidance and thanked her colleagues for their generous assistance and patience.

C. Retaliation for Filing a Grievance

Grievant makes the following claims to support her allegation that she experienced retaliation by the Department for filing a grievance:

(i) Suspension of Travel Order and Reassignment to Washington

Grievant: On August 27, {year}, grievant received notification that she had been denied tenure. Her separation date from the service was set for November 1, {year}. Grievant claims that she debated whether to file a grievance, but decided against it because she was concerned about how quickly the Department might resolve her grievance. Instead, grievant claims that she decided to move to Washington, DC from {city name}. According to grievant, she made two trips to Washington to discuss her career and other options with representatives of the Department and AFSA³. During these consultations, grievant asserts that she stated that she might file a grievance regarding the denial of tenure. She claims that she stated more than once

³ American Foreign Service Association.

that she would be receiving travel orders to return to Washington from {city name}. She also advised Department representatives that she would need to secure employment in DC while her grievance was being reviewed. She complains that at no time was she informed that she would not be authorized to travel during the pendency of her grievance.

Grievant received a travel order on October 23, {year}, authorizing travel between November 1 and November 7, {year}. Grievant filed her grievance with the Department on October 27, {year}. On October 30, {year}, grievant received notice that the Department had suspended her travel orders. Grievant complains that she had no notice from the Department that she would have to remain in {city name} pending a decision on her grievance. She had already packed out her personal effects on October 28, which she claims resulted in additional personal expense and inconvenience.

After the instant grievance was filed, grievant fell and fractured her shoulder in {city name}. In order to receive treatment, grievant moved to a wellness center with rehabilitation facilities in {city name}. Grievant claims that she was told by Department representatives that a decision on her grievance was forthcoming, and therefore she expected to leave {city name} and return to Washington shortly thereafter. Doctors in {city name} advised her to seek further treatment in DC, where she was expected to be living long-term. On December 1, {year}, grievant saw a doctor in Washington who advised that she begin physical therapy as soon as possible. Grievant returned to {city name}, but was convinced that a move to Washington was now imperative, given her DC doctor's instructions and her personal circumstances. She claims that she had a strong network of friends in Washington and could receive adequate care there during her rehabilitation. She continued to receive medical care in Washington, but because the agency refused to authorize a reassignment to Washington, grievant says she was forced to use

all of her accumulated sick and annual leave. Grievant states that there was no reason for the Department to have denied her request for a Medical Hardship transfer.

Department: The agency asserts that grievant's retaliation claims are without merit. On September 22, {year}, grievant requested *separation* travel orders which were authorized on October 21. The Department explains that grievant's travel orders were suspended when she filed the grievance because the grievance itself acted to suspend grievant's separation. The agency argues that grievant has provided no justification for why it should not have suspended her travel orders under the circumstances. As for grievant's continued assignment to CS-{city name}, the Department states that it could not reassign grievant to Washington because it was obliged to keep her in duty status pending completion of the grievance process. Regarding grievant's request for a transfer due to medical hardship, the Department observes that although it understands grievant's preference to remain in Washington for treatment, she chose to seek medical treatment in Washington rather than at her current post of assignment, {city name}. In its Opposition to Grievant's Request for Interim Relief, the Department stated that "Grievant has no legal entitlement to an assignment of her choice, and her decision to seek medical treatment for her shoulder injury in Washington, D.C. should not obligate the US&FCS to alter her current assignment to {city name}." The Department further quoted the Board's Order on Interim Relief, stating, "[o]nce grievant filed her complaint, the Department was on notice to cease all separation actions, including separation travel pending disposition of her grievance. There was no showing that cancellation of her travel orders and her retention in her current post of assignment under such circumstances was inappropriate." The Department further asserts that it was not involved in selecting the date that grievant decided to pack out her belongings. She alone chose to proceed with the shipment on October 28, despite the fact that she elected to file

her grievance the day before. Grievant, therefore, bears financial responsibility for her decision to move. The agency argues that its assessment of costs for the move to grievant is not retaliatory.

(ii) The 2009 PA

Grievant: Grievant states that after she was separated from the service on April 25, {year}, she received a phone call from her rating officer telling her that she was required to send an accomplishment statement for the 2008-09 PA due in June. Grievant relates the following with respect to the request:

I was flabbergasted. I had been at CS-{city name} for two weeks in April, then separated and no mention had been [made] of the need for a Statement of Accomplishments or Performance Appraisal.

Had I known an Accomplishment Statement and PA were required, I would have spent my last two weeks period at CS-{name} differently. I would have assessed counseling sessions, memorialized client visits, and called clients to harvest Export Successes and the like. Instead, as stated above, I cleaned out my files, threw away materials, eliminated files from my computer and packed my office belongings. . . . Now as a separated employee, I no longer had access to the FCS Intranet, CS-{city name} Calendar or Aplicor. I could not provide an Accomplishment Statement.

Grievant expressed concern because since she was then separated from the service, she might not have a chance to grieve the 2008-9 PA because she was no longer an FCS employee. Grievant and AFSA protested the request to submit a statement of accomplishment. A PA was submitted without grievant's statement of accomplishments, but the parties subsequently agreed to remove the PA from grievant's file and keep it separately during the period of the grievance. Grievant concludes her arguments by stating, "I maintain that the Department's actions are a grave and egregious violation of FAM regulations prohibiting actions 'alleged to be in the nature of reprisal or other interference with freedom of action in connection with participation by a

member in procedures under this chapter.”” She further alleges that the Department “has engaged in a pattern of cruel retaliatory actions designed to harass and intimidate me, the Grievant.”

Department: The Department did not comment on this allegation.

IV. DISCUSSION AND FINDINGS

In all grievances other than those involving disciplinary actions, the grievant has the burden of establishing, by a preponderance of the evidence, that the grievance is meritorious. 22 CFR § 905.1(a). That burden entails not only establishing that grievant’s material factual allegations are more likely true than not, but also that the erroneous agency actions or omissions that have been established “may have been a substantial factor” in causing the harm alleged. 22 CFR § 905.1(b). In cases dealing with performance evaluations, the Board has stated:

As a general matter, EERs must meet reasonable standards; perfection is not required. The critical test is whether an EER fairly and accurately describes and assesses performance and potential with adequate clarity and documentation to constitute a reasonably discernible, objective and balanced appraisal. FSGB Case No. 2002-005 (April 2, 2002); FSGB Case No. 2003-007 (October 25, 2005).

The issues must be resolved in each case based on the particular circumstances presented. We first review the disputed language of the three performance appraisals and then consider grievant’s allegations of retaliation.

The 2005-06 Performance Appraisal

Grievant cites two statements that she considers to contain material omissions and/or to be “tepid, unfair, inaccurate, unwarranted or falsely prejudicial.”

(1) grievant faces difficult challenges in view of the seniority of the staff she manages both directly and as Acting Senior Commercial Officer.

In addition to challenging this statement, grievant claims that her evaluation omitted some responsibilities that she handled while serving as Acting SCO. Grievant argues that these additional responsibilities refute the statement by her rating officer that *she was unable to manage senior staff*. We do not read the statement to suggest explicitly or implicitly that grievant was *unable* to manage the staff. We believe she reads too much into the comment. Instead, we find that a fair interpretation of the statement is that the rater simply reports that grievant faced difficult management challenges because of the seniority of her staff, a comment not at all critical of her performance. Grievant does not refute the factual basis of the statement. According to the record, grievant's staff was senior and posed difficult management challenges for her. We do not find the statement to be inaccurate or falsely prejudicial.

As for grievant's assertion that there were material omissions in this PA of her work performance as Acting SCO, grievant does not specify what responsibilities were omitted from the PA. Moreover, we find that grievant provided a complete statement of her accomplishments as Acting SCO that was viewed by the tenure board. We, therefore, do not find sufficient evidence of material omissions in this PA.

(2) The large increase in CS products generated by our office demands effective time management, the ability to prioritize, and timeliness, all areas in which grievant continues to demonstrate rapid improvement. Grievant is finding her way in terms of the right balance between well written material produced by non-native English speakers and the need to get the product out the door.

Grievant does not dispute the necessity in the office for effective time management skills and the ability to prioritize. Viewed in context, we do not consider the comment that grievant continues to demonstrate rapid improvement in these competencies pejorative. The PA also includes laudatory statements concerning grievant's writing and editing skills as well as her attention to detail. While she cites her timely preparation and issuance of the CCG, she does not

offer evidence to counter the statement that she was indeed “finding her way” toward achieving the “right balance” between the written product of non-native English speakers and the need for expedited delivery of their work product. In fact, grievant acknowledges that her standards for completing reports and other products for clients differed from those of her rating officer. She also admits to spending additional time with local staff to assist them in the preparation of their written work. We conclude that the challenged statement is accurate and not falsely prejudicial.

We further conclude that the supplementary testimonials provided by grievant to demonstrate inaccuracies in the PA are inapposite to grievant’s claims. They were provided by persons who were not grievant’s supervisors; they were not contemporaneous with this PA; nor did they address the specific performance concerns raised in the challenged statement. We do not view the testimonials as probative of the issues in this instance.

The 2006-2007 Performance Appraisal

Grievant disputes four statements in the 2006-07 PA.

(1) [Grievant] failed to submit a statement by March 15, {year}, the required 21 days after departure from Post and six days prior to the deadline for submitting the completed signed Performance Plan and Appraisal to Washington, DC.

Grievant cited “extenuating circumstances” for her failure to submit her statement of accomplishments by the March 15 deadline. While she asserts that the deadline was not until April 8, she admits that she did not submit the statement until June 25. Grievant offers no facts to persuade us that the deadline was any date other than March 15. The rater gave her fair warning that he would proceed to draft her PA without the statement if she did not submit it on time. Even considering her extenuating circumstances, we find that grievant could have submitted the document on time or she could have made a request for a reasonable extension. She did neither. We find the statement to be true and not falsely prejudicial.

(2) In certain areas, grievant faces challenges, particularly in meeting deadlines. Personnel related documents are one example. Although grievant ensured that the work plans and appraisals for the two employees she supervised were completed, not all were timely.

Grievant asserts that workplace dissension among local staff caused her to expend additional time to counsel staff members and to take care in downgrading their appraisals. Grievant does not dispute that she was late submitting the evaluation materials for the two employees. The accurate observation by her rater, therefore, was not falsely prejudicial.

(3) Her statement of accomplishments for her 2006 appraisal was, similarly, submitted after the July 15 deadline for submission of the Performance Plan and Appraisals to Washington.

Grievant argues that her completed PA was submitted on time. But the comment in the PA is that her *statement of accomplishments* was untimely because it was submitted less than two weeks before the completed PA was due. She does not dispute the accuracy of this criticism. The parties disagree only about the final deadline for submission of the completed PA. But that deadline is irrelevant to the accuracy of the challenged statement. On the record before us, grievant submitted her statement of accomplishments to her reviewer late, which then had an impact on both her rater and reviewer's ability to complete the performance appraisal. We conclude that the challenged statement is accurate, balanced, and not falsely prejudicial.

Likewise, grievant produced no evidence that she was the victim of discrimination. She failed to show that other officers who submitted late statements of accomplishments did not also receive negative comments on that fact in their PAs.

(4) Communication with management for clarity in terms of responsibilities and expectations is another area for grievant to build on. In those instances where the workload becomes unsustainable, I would encourage grievant to take the initiative in work with management to recalibrate roles, duties and responsibilities.

Grievant's attempt to dispute the above statement by referring to another statement in the PA completely misses the mark. The disputed comment speaks of grievant's need to improve her communication with management about her responsibilities. The statement grievant references mentions that it became necessary to reduce her responsibilities to ensure that they were met. Grievant does not contest this analysis of the statements. She offers an excuse for her failure to communicate with managers about her job performance. She claims that she was reluctant to communicate constraints on her ability to complete work responsibilities because she did not want to emphasize her disability. Thus, grievant acknowledges that she was reluctant to communicate with management and does not otherwise contest the factual accuracy of the language. We find that while the statement contains certain negative implications, there is nothing in it that attributes the criticism to grievant's disability or that has been shown to be inaccurate or falsely prejudicial.

The 2007-08 PA

Grievant cites four statements that she argues contain omissions, or are "tepid, inaccurate, unfair, or falsely prejudicial."

(1) She initially shared a past experience of technology not being a strength and was immediately given the responsibility of backing up the office servers. The whole office has supported her and her efforts to become more comfortable with technology. . . . It is essential that she continue to develop her technology skills and understanding to improve her efficiency and productivity.

Grievant interpreted this statement as referring to her disability which she described as "grossly unfair." At the same time, grievant freely acknowledged that technology was not her strength. We see nothing prejudicial in this accurate statement and can discern no reference to grievant's disability. The statement credits grievant for making efforts to become more

comfortable with technology and suggests simply that she should “continue to develop her technology skills and understanding.”

(2) From her mid-year, grievant has improved in ensuring that she is clear on when she will meet deadlines and communicating with me if she is unable to meet a deadline because of some unforeseen circumstance. This is the essential [sic] in serving our clients and in collaborating with colleagues in the office.

Grievant interprets this statement as implying that she was unable to meet deadlines and, therefore, unable to serve clients or collaborate with colleagues. Nonetheless, grievant acknowledges that, to avoid being regarded as disabled, she set unrealistic deadlines for herself. Thus, we see nothing inaccurate or falsely prejudicial in the statement. Moreover, we do not construe the statement as suggesting that grievant had problems with clients or colleagues. Rather, it is merely a suggestion that grievant should communicate better when deadlines cannot be met. The statement regarding clients and colleagues is “facially neutral.”

(3) An area in need of improvement is her operational effectiveness. An example is her accomplishment statement, originally it was to be completed by June 10th, and it was finally placed on my desk July 3rd.

Grievant argues that “internal” deadlines were flexible and, therefore, the statement is unfair and unwarranted. Again grievant does not dispute the factual basis of the statement. Her perspective on internal deadlines is consistent throughout her grievance, but it does not comport with what the record shows was required. The only evidence in the record is that grievant missed several deadlines that impacted the operational effectiveness of her rater. Grievant does not refute the Department’s position on this and we see no falsely prejudicial aspect or unfairness in the disputed statement.

(4) As our office has moved to the balanced scorecard, the importance of entering information to CTS and e-menu is extremely important to measure activities and for the transparent delivery of service. The activities, both counseling sessions and export successes, entered in CTS by CO grievant do not accurately reflect her contribution to this office and the CS organization.

Grievant acknowledges the truth of the statement, but states that the software and system were not compatible with the software she was using to accommodate her disability. She adds that the CTS system was not compliant with the Rehabilitation Act of 1973 and that she was unable to operate it because of her disability. The undisputed evidence, however, shows that grievant failed to complain about difficulties she claims to have had in using the CTS system during the rating period. We see the challenged statement as underscoring the importance of entering appropriate information into a database both to measure performance and to deliver services. The second part of the statement is an undisputed factual assertion that grievant did not accurately input all of her contributions into the database. The implication is that grievant accomplished more than what she registered. The statement, therefore, recognizes that her contributions were understated. We do not see this as unfair or falsely prejudicial, but rather a factual observation. We further observe that grievant expressly declined to bring her grievance under the Rehabilitation Act of 1973.

In sum, the Board has reviewed the disputed language of the PAs at issue and has taken into account the evidence presented in the ROP. We find grievant's assertions are primarily explanatory and in most instances do not substantively challenge or dispute the factual statements and assertions about which she complains. Grievant produces much explanatory material, but there is a notable lack of any argument contesting the accuracy of the statements that she challenges.

Underlying Bias and Unbalanced Appraisal

Grievant claims that her rater was influenced by rumors about her performance and curtailment while in Athens and that such bias was reflected in her 2007-08 PA. She also complains that the PA did not accurately reflect her contributions during the rating period. She

claims the PA lacked balance regarding her performance and potential. The ROP indicates that the rating officer did speak with grievant's former rating officer before he drafted the PA. It is uncontested that the rater assured grievant, however, that her reported experience in {city name} would not influence his evaluation of her performance in {city name}. He advised her that she had a "clean slate" in the {city name} Office. We have reviewed the PA as well as the accompanying ROP carefully and we see no evidence of bias. The rater commends grievant for her specific achievements, including production of the 2007 Country Commercial Guide, about which he stated:

. . . grievant edited and oversaw the compilation of the elements of the Guide, and worked well with other Embassy members to ensure that it was completed and submitted to the Deputy Chief of Mission in a timely fashion. The deadline for submission of the [CCG] coincided (approximately) with her departure from post. Despite this, grievant remained focused on the task at hand and delivered in the end an excellent product for our clients.

Similarly, the rater gave grievant credit for overcoming significant problems to ensure that the 2006 market research reports were available to clients on the Market Research Database. The rater commented: "The results of her efforts have now given us a better understanding of the market research proposal and uploading process. . . . Thanks to grievant's work, all of our 2006 and 2007 reports are now being successfully uploaded." Similarly, the rater commended grievant for her supervision of locally engaged staff. With respect to the allegation that the PA failed to cite specific contributions by grievant, it is undisputed that she was nearly a month late submitting her statement of accomplishments. Despite this failure to meet internal deadlines, the rater included in the appraisal all of the areas of accomplishment that grievant had requested him to include since she lacked space in her own statement to do so. We find that there is no bias in the PA and that it is sufficiently balanced. Nor was there any showing that there were omissions

of additional facts in the PAs that were needed to present a fair and balanced picture of the grievant's performance. To the extent that grievant complains that her rater failed to make a recommendation about promotion, grievant does not establish that she was entitled to such a recommendation or that the absence of one was falsely prejudicial.

Retaliation for Filing a Grievance

Grievant alleges that the Department retaliated against her for filing a grievance by suspending her travel orders from {city name} to Washington, refusing to reassign her to Washington, despite her medical condition, and requiring that she submit a statement of accomplishments for the {year} PA after she was separated from the Service. As we stated in our previous order for interim relief dated April 10, {year}, we agree with the Department's assessment of the situation regarding the travel orders and the assignment. Once the grievance was filed, the Department was obligated to cease all separation actions, including separation travel pending disposition of the grievance. 3 FAM 4431. There was no showing by grievant that cancellation of her separation travel orders or retention in her current post of assignment (duty assignment) under such circumstances was inappropriate or motivated by ill will.

Regarding the requirement that grievant submit a statement of accomplishments for the 2008-09 PA after her separation, we regard the issue as moot given the actions of the Department in cancelling the requirement for the statement itself and removing the PA from grievant's personnel file pending this appeal.

V. DECISION

The grievance appeal is denied.